

## **Testimony of James McVay, Deputy Special Counsel**

Mr. Chairman, Members of the subcommittee, thank you for inviting me to testify today.

I am the Deputy Special Counsel at the U.S. Office of Special Counsel (OSC) and am pleased to be here to explain our office's role in protecting federal whistleblowers from retaliation. The OSC is an independent federal investigative and prosecutorial agency. Our authority and responsibility comes from four federal statutes; the Civil Service Reform Act (CSRA), the Whistleblower Protection Act (WPA), the Hatch Act, and the Uniform Services Employment and Reemployment Rights Act. OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices (PPP), especially reprisal for whistleblowing.

OSC receives, investigates, and prosecutes allegations of Prohibited Personnel Practices, with an emphasis on protecting federal government whistleblowers. OSC has authority to seek corrective action for aggrieved employees such as back pay and reinstatement. We do this through negotiation or by filing an action in front of the Merit Systems Protection Board (MSPB). OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit PPPs. Punishment can range from a simple letter of counseling all the way to debarment from federal service.

OSC provides a secure channel through its Disclosure Unit for federal workers to disclose information about various workplace improprieties, including a violation of law, rule or regulation, gross mismanagement and waste of funds, abuse of authority, or a substantial danger to public health or safety.

OSC promotes compliance by government employees with legal restrictions on political activity by providing advisory opinions on, and enforcing, the Hatch Act. Every year, OSC's Hatch Act Unit provides over a thousand advisory opinions, enabling individuals to determine whether their contemplated political activities are permitted under the Act. The Hatch Act Unit also enforces compliance with the Act. Depending on the severity of the violation, OSC will either issue a warning letter to the employee, or prosecute a violation before the MSPB.

OSC protects the reemployment rights of federal employee military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

As I stated earlier, Protecting employees and applicants from reprisal for whistleblowing was a primary purpose of the Civil Service Reform Act.<sup>1</sup> However, we have no jurisdiction to handle claims from intelligence agency employees such as the Central Intelligence Agency, the Federal Bureau of Investigation, the Defense Intelligence Agency, the National Security Agency and others specifically excluded by the President. OSC takes no position on the merit of whether they should or should not be covered. There are other organizations and professionals that are able to more competently discuss these issues. Nonetheless, I can testify as to how OSC investigates and proves whistleblower retaliation claims. I hope this can be of benefit to this committee in rendering appropriate legislation.

I would like to preface the remainder of my comments by explaining what I mean when I say the word "whistleblower", and not just in the context of government.

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<sup>1</sup> In re Frazier, 1 M.S.P.R. 163, 165 n.1 (1979).

In the theoretical sense, I am talking no less than good versus evil – right versus wrong. In its purest form a whistleblower is an individual that is willing to take on all odds, often in the face of danger and retaliation, to bring to the light of day a wrong that has been committed against society. Their intention is no less than creating a better society in which to live and an ethical government that rules us all. In fact, I believe that the American republic can not long survive without disciplined government and a fair and honest corporate structure. Whistleblowers serve that end.

America has the finest tradition of whistleblowers. Popular examples are Frank Serpico, who brought to light corruption in the NYPD, and was later abandoned by his fellow officers when shot by a drug dealer. Another contemporary example is the “insider” who blew the whistle on the tobacco industry for making their product more addicting.

As an interesting aside, Serpico actually favors the term “lamplighter” over the use of the word “whistleblower.” He likes to point out that Paul Revere, who made that midnight ride on 4-18-1775, was the first lamplighter. The lighted lamp warned the people of Massachusetts of the British invasion. He believes that whistleblowers are lamplighters that shed the light of truth and warns the citizenry of waste, fraud and corruption. He believes they also shed light on the path to be taken by all of those in places of power.

For a modern example of a lamplighter/whistleblower and in the context of the federal worker, Ernie Fitzgerald brought to light billions of dollars in cost overruns in the construction of the C-5A transport aircraft. It cost him his job when his managers

retaliated against him. His case was one of the groundbreaking cases reviewed in the Leahy commission report, which later gave us the Civil Service Reform Act.

OSC receives up to 700 whistleblower reprisal claims per year. Additionally, we receive approximately 450 whistleblower disclosure cases per year. After an initial screening for jurisdiction and to ensure the Whistleblower has stated a prima facie case, the meritorious reprisal cases are sent to our investigation and prosecution division. Ultimately the case may end in trial at the MSPB. In reprisal cases OSC must establish the following elements by preponderant evidence:

1. Complainant made a **protected disclosure**;
2. a personnel action was taken, not taken, or threatened;
3. the official responsible for the personnel action knew about Complainant's protected disclosure; and
4. the protected disclosure was a contributing factor in the official's decision to take, fail to take, or threaten the personnel action.

Once OSC establishes these elements, then the agency has the opportunity to defend its action by showing with clear and convincing evidence that it would have taken, failed to take, or threatened the same personnel action even in the absence of the Complainant's protected disclosures.

A "protected disclosure" is one that the discloser **reasonably believes** evidences one of the identified conditions in the statute. However, like all acts of Congress the courts have added changes. In Horton v. Department of the Navy, the Federal Circuit held that disclosures made directly to the wrongdoer are not protected because such disclosures are not to a person in a position to act to remedy the problems revealed in the

disclosures. The court reasoned that the Whistleblower Protection Act was intended to protect only disclosures to persons who are in position to act to remedy the condition and, the court assumes, the wrongdoer is not such a person. The court failed to explain why a disclosure to the wrongdoer would not be reasonably calculated to remedy the wrongdoing. In reality, they assume the wrongdoer is of such low character that he would not self report or cease his violation.

In a move to further narrow the law, however, the Federal Circuit in Willis v. Department of Agric., 141 F.3d 1139 (Fed. Cir. 1998), held for the first time that a disclosure made in the regular course of one's duties does not qualify as whistleblowing, even if it evidences violations of law. The court held that such a disclosure is not whistleblowing because the employee is simply doing his job; he is not putting his own personal job security at risk for the benefit of the public.

Next, I will discuss OSC's authority to review whistleblower disclosures under 5 USC § 1213, through our Disclosure Unit. These are the cases that do not necessarily have an allegation of reprisal. When Special Counsel Bloch took office in January 2004, this unit was adrift in a sea of backlogged cases. In a little over one year we have been able to reduce the case load in the Disclosure Unit by 88%. We started the year 2004 with more than 600 whistleblower cases and ended with fewer than 100. We have been able to maintain this same count. During this same period we were able to increase our referrals to the agencies by nearly double.

Under this statute, as most of you may know, my office has no investigative authority over the substance of what the whistleblower discloses. This is where we have a unique relationship with the Federal Executive Agencies and the Inspectors General.

Under the statute we are required to refer the underlying disclosure to the head of the agency for an investigation and report which eventually will be transmitted to the President and the agency's congressional oversight committees, along with an analysis by the Special Counsel.

A perfect example is the case that involves a main engine component of the C-5 Galaxy military aircraft. An aerospace engineer, with more than 25 years experience, disclosed that the Air Force was using unsafe repair methods that could result in catastrophic failure of the engine, i.e. the engine falls off during flight. The repair method used was specifically contrary to the manufacturer's specifications and directions.

In conclusion I would like to cite one of our founding fathers. John Adams said in 1776, "Good government is an empire of laws." At OSC, we believe in an empire of laws, which create good government and inspire integrity and public trust. While we must as Americans live with the idea of not trusting our government fully, we can also take pride in the fact that we among the nations of the world are a leader in protecting the lamp lighters that shed the light of truth on government fraud, waste and abuse.

Thank you for the opportunity to testify and I am happy to take any questions.